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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1610~~ 70-136

F. D. RICH COMPANY, INCORPORATED, a corporation doing business in the state of Washington and AMERICAN SURETY COMPANY, *Petitioners,*

v.

ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation; B & G CONSTRUCTORS, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANY; and UNITED STATES FIDELITY & GUARANTY COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD S. WHITE
1610 Washington Building
Seattle, Washington 98101
Attorneys for Petitioners F. D. Rich Company, Incorporated and American Surety Company.

Of Counsel:

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON

JOHN E. EDERER
1610 Washington Building
Seattle, Washington 98101

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 28, 1970.

OPINIONS BELOW

The District Court for the Western District of Washington delivered no written opinion aside from the Findings of Fact, Conclusions of Law, and Judgment entered in that court. The opinion of the Court of Appeals which reversed and remanded the judgment of the District Court is printed in the Appendix hereto at pages 1a-7a and is not yet reported in the official

reports. A *per curiam* opinion of the Court of Appeals which denied the petition for rehearing filed by petitioners herein is printed in the Appendix hereto at pages 9a-10a and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on December 28, 1970, a copy of which judgment is appended to this petition at page 8a of the Appendix. On April 8, 1971, the Court of Appeals issued its Order denying petitioners' petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in interpreting the Washington law in existence at the time of the dissolution of Piper & Greenhalgh, Incorporated, to the effect that such dissolution abated any action in which the dissolved corporation was a party, as a *procedural* rule rather than as *substantive* law.

2. Whether Rule 25 of the Federal Rules of Civil Procedure overrides the substantive law of the State of Washington so as to permit a federal court to direct the substitution of shareholders for a dissolved corporate plaintiff in an action which, under Washington law, abated upon the dissolution of the corporation.

STATUTE AND FEDERAL RULE INVOLVED

The statutory provision involved herein is Washington Laws of 1939, Chapter 143 § 10, codified as RCW 23.01.630 (1) and (2), as follows:

> *23.01.630 Order of dissolution—Certificate—Undiscovered assets.* (1) When a corporation has

been completely wound up, the court, if the proceeding is subject to the supervision of the court, shall make an order declaring the corporation to be dissolved; and if the proceeding is out of court, the trustee or trustees shall sign and acknowledge a certificate stating that the corporation has been completely wound up and is dissolved.

(2) Said order or certificate of dissolution shall be delivered to the secretary of state, who shall file the same for record in his office without charge, and thereupon the corporate existence shall terminate.

The pertinent portions of Rule 25 of the Federal Rules of Civil Procedure involved herein are as follows:

Rule 25. *Substitution of Parties.*

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon

the record and the action shall proceed in favor of or against the surviving parties.

* * *

(c) *Transfer of Interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court of the United States for the Western District of Washington, Southern Division was Title 28 U.S.C., Section 1332 and Title 42 U.S.C., Section 1594.

This action was instituted by Piper & Greenhalgh, Incorporated, a subcontractor on an army federal defense housing project contract, for damages, and included sizeable counterclaims and cross-claims by F. D. Rich Company, Incorporated (hereinafter petitioner Rich) and B&G Constructors, Incorporated (hereinafter B&G). It stems from contractual disputes experienced during construction of a 500-unit housing project for military personnel at Fort Lewis, Washington in 1962-1963. The general contractor, petitioner Rich, undertook with the United States to construct the project in 540 calendar days for $7,664,827. The controversy centers on termination by petitioner Rich of its lathing, plastering and tiling subcontractor, Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, following the latter's refusal to continue its work on the project.

The pivotal facts pertaining to the questions presented in this petition were stipulated, which stipula-

tion is printed at pages 11a-12a of the Appendix hereto. The action was begun in 1963 by Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, a Washington corporation organized pursuant to the Revised Code of Washington, Title 23. On October 18, 1965, a resolution for voluntary dissolution of Piper and Greenhalgh, Incorporated, was adopted by Val B. Greenhalgh and George Piper, represented in the acknowledgment thereto to be "the holders of all the capital stock." (Record 1088-1090). This resolution was filed by their attorneys with the Secretary of State of the State of Washington on November 10, 1965 in compliance with RCW 23.01.530. On February 18, 1966, eight months before trial, the Secretary of State issued a certificate of final dissolution. This order declared Piper & Greenhalgh, Incorporated to be dissolved pursuant to RCW 23.01.630. Under the express wording of that statute, " . . . thereupon the corporate existence . . . terminate[d]". *There was then no Washington statute which prolonged the life of the corporation for litigation purposes.*

Neither Piper & Greenhalgh, Incorporated, its stockholders nor its attorneys brought the fact of dissolution to the attention of the District Court or petitioners. On the contrary, through numerous filings in the District Court after final dissolution, including the affidavit testimony of Val B. Greenhalgh, it was falsely represented that the plaintiff was a viable Washington corporation.

By agreement the issues of liability and damages were severed. Trial of the liability issues commenced on October 7, 1966 before a jury, which returned a verdict in favor of Piper & Greenhalgh, Incorporated against petitioners, B & G and B & G's surety. The

District Court granted petitioners' motion for judgment nothwithstanding the verdict and alternatively granted petitioners' motion for new trial. The Court of Appeals reversed the judgment notwithstanding the verdict and affirmed the District Court's order granting the motion for new trial. Petitioners do not seek review of that portion of the decision by this petition.

After the trial on liability, through chance, counsel for petitioners learned of the dissolution of Piper & Greenhalgh, Incorporated. Accordingly, petitioners moved for dismissal of the actions by and against the dissolved corporation on the ground that they had abated by operation of law. George Piper and Val B. Greenhalgh moved to be substituted in place of the corporation.

The District Court conducted a special post-trial hearing on the issues of abatement and substitution of parties (Liability Transcript 1658-1703). After briefs were submitted, the court issued its oral opinion granting petitioners' motion to dismiss and denying the motion for substitution (Liability Transcript 1711-16). Formal findings and an order abating the action as to Piper & Greenhalgh, Incorporated and denying the motion to substitute parties were thereafter entered (Record 1415-23).

The Court of Appeals reversed. While acknowledging that the applicable Washington law then provided that the dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff, the Court of Appeals held that the Washington rule was a *procedural* rule and that the District Court was not bound by the *procedural* rules of the State of Washington but rather was bound by the Federal Rules of

Civil Procedure. It concluded that under Rule 25(c) of the Federal Rules of Civil Procedure, the motion to substitute parties, made by two of the stockholders of the dissolved plaintiff, should have been allowed by the District Court.

REASONS FOR GRANTING WRIT AND ARGUMENT

A. REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, insofar as it (1) construes the Washington law regarding the abatement of actions by and against a dissolved corporation to be a state procedural rule not binding upon the District Court and (2) directs the substitution of shareholders for a dissolved corporation in an action which abated under applicable Washington law, is in direct conflict with the decisions of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257 (1927); *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg., Corp.,* 302 U.S. 120 (1937); *National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609 (1875); *Defense Supplies Corp* v. *Lawrence Warehouse Co.,* 336 U.S. 631 (1949); and *Melrose Distillers* v. *United States,* 359 U.S. 271 (1959).

2. The decision is in conflict with the Court of Appeals, Tenth Circuit, in *United States* v. *United States Vanadium Corp.,* 230 F. 2d 646, cert. den., 351 U.S. 939 (1956) and *R. V. McGinnis Theatres & Pay T. V., Inc.* v. *Video Independent Theatres, Inc.,* 386 F. 2d 592 (1967), cert. den., 390 U.S. 1014 (1968). It is in conflict with the Court of Appeals, Seventh Circuit, in *United States* v. *P. F. Collier & Son Corp.,* 208 F. 2d 936 (1953) and with the Court of Appeals, Sixth Circuit, in *United States* v. *Line Material Co.,* 202 F. 2d 929 (1953).

3. The decision of the Court of Appeals disregards the controlling decisions of the Supreme Court of the State of Washington in *State ex rel. National Surety Co.* v. *Superior Court,* 180 Wash. 587, 41 P. 2d 133 (1935) and *Columbia Building Co.* v. *National Surety Co.,* 194 Wash. 51, 76 P. 2d 1027 (1938) (which held that pending suits against a corporation abate upon dissolution) in erroneously holding the Washington rule to be a procedural rule.

4. The decision of the Court of Appeals erroneously interprets Rule 25 of the Federal Rules of Civil Procedure as giving a federal court the power to continue in existence by the procedural device of substitution an action which, upon dissolution of a corporate party, has abated under the substantive law of the state of incorporation. Such a decision, if allowed to stand, would permit encroachment by the federal judiciary, through court rules, on a matter exclusively within the province of the state which brought the corporation into being.

B. ARGUMENT

The District Court and the Court of Appeals Correctly Held That Under Washington Law the Actions by and Against Piper & Greenhalgh, Inc. Abated Upon Its Dissolution

Petitioners agree with the Court of Appeals' conclusion that the applicable law of Washington in existence at the time of dissolution of Piper & Greenhalgh, Incorporated, was the common-law rule that such dissolution abated any action in which the dissolved corporation was appearing either as plaintiff or defendant. *State ex rel. National Surety Co.* v. *Superior Court,* 180 Wash. 587, 41 P. 2d 133 (1935) and *Columbia Building Co.* v. *National Surety Co.,* 194 Wash. 51, 76 P. 2d 1027 (1938).

The rule applied in each decision was stated:

> "This court, in accord with the weight of authority, has held that pending suits against a corporation abate upon dissolution of the corporation, unless the life of the corporation is prolonged by statute for the purpose of winding up its affairs with power to sue and be sued." 194 Wash, at p. 55, quoting from 180 Wash. 587)

The District Court and the Court of Appeals correctly determined there was no Washington statute prolonging the life of Washington corporations for any purpose at the time of the dissolution of Piper & Greenhalgh, Incorporated. Consequently, under Washington law, the subject actions by and against Piper & Greenhalgh, Incorporated abated.

The Court of Appeals' Interpretation of the Applicable Washington Law re Abatement as a Procedural Rule Is Erroneous

In its original opinion the Court of Appeals cited *United States* v. *Spokane Mill Co.*, 206 F. 999 (E.D. Wash. 1913), a federal case in which Washington law was applied to determine that the effect of the dissolution of a corporate defendant was to abate a pending action, as authority for the statement:

> The applicable Washington law then provided that dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. (Appendix, p. 4a).

It reaffirmed that statement in its *per curiam* opinion, denying the petition for rehearing (Appendix, p. 10a). It then proceeded to hold, without any citation, that the Washington rule was a *procedural* rule (not substantive state law), and thus not binding upon the Dis-

trict Court. That conclusion was in direct conflict with the *Spokane Mill Co.* decision and in conflict with the well-established law as enunciated in numerous decisions of this Court. *National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609 (1875); *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257 (1927); *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg., Corp.,* 302 U.S. 120 (1937); *Defense Supplies Corp.* v. *Lawrence Warehouse Co.,* 336 U.S. 631 (1949); and *Melrose Distillers* v. *United States,* 359 U.S. 271 (1959).

The court in *Spokane Mill Co.* relied upon *National Bank* v. *Colby* in stating the question of the effect of dissolution to be one of local law:

> In *Hawley* v. *Bonanza Queen Mining Co.,* 61 Wash. 90, 111 Pac. 1073, the court held that a corporation organized under the laws of this state was dissolved by operation of law for failure to pay its annual license fee for a period of two years, or to apply for reinstatement within the time prescribed by law thereafter, and that such dissolution during the pendency of an action abated the action by mere operation of law. *The proposition that a corporation is dissolved by operation of law for failure to pay its annual license fee presents a mere question of local law, upon which the decision of the highest court of the state is final, and the proposition that the dissolution of the corporation abates an action pending against it is fully supported by the decisions of the Supreme Court of the United States.*
>
> In *National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609, 22 L.Ed. 687, Mr. Justice Field said:
>
> "With the forefeiture of its rights, privileges, and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended; it was then a defunct institution, and judgment could no more

be rendered against it in a suit previously commenced than judgment could be rendered against a dead man, dying pendente lite. *This is the rule with respect to all corporations whose charter existence has come to an end, either by lapse of time or decree of forfeiture, unless by statute pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation.* No such enactment is found in the act of Congress authorizing the creation of national banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time. 'I cannot distinguish,' says Story, in *Greeley* v. *Smith,* 3 Story, 658 [Fed. Cas. No. 5,748], 'between the case of a corporation and the case of a private person dying pendente lite. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as in the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and prosecute or defend the suit. No such provision exists as to corporations, *nor, indeed, could exist without reviving the corporation pro hac vice, and therefore any suit pending against it at its death abates by mere operation of law.*'" (Emphasis added) (206 F. at p. 1000)

The *Spokane Mill Co.* opinion was later cited as authority by this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257, 259-260 (1927), where it was held:

> There is no specific provision in our rules for the substitution as a party litigant of a successor to

> a dissolved corporation. It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. [Citations omitted] It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation pro hac vice. *But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.* (Emphasis added)

The fundamental law of Washington, the state of incorporation of Piper & Greenhalgh, Incorporated, provided that the action abated.

In *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg., Corp.*, 302 U.S. 120 (1937), this Court again held that the effect of dissolution upon a pending action was exclusively a matter of state law. At pages 124-125, this Court said:

> The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural

> person. There must be some statutory authority for the prolongation of its life, even for litigation purposes.

The court continued:

> How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. [Citations omitted] The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority. (302 U.S. at pages 127-128)

Defense Supplies Corp. v. *Lawrence Warehouse Co.*, 336 U.S. 631 (1949) involved a federally-created corporation and the effect of its dissolution on an action to which it was a party at the time of dissolution. In its opinion this Court summarized the general rules regarding the effect of dissolution as follows (citations omitted):

> Our decision rests upon interpretation of the statute dissolving Defense Supplies Corporation. For although our conception of a corporation centers upon legislative grant rather than spontaneous existence, . . . the courts have generally treated a corporation's demise much as they have that of a natural litigant. . . . The parallel has not been the subject of universal admiration, . . .

> and is by no means exact. . . . But at least one facet of the analogy has seemed too clear to permit change without an "independent lift of power" from the Congress. Whether phrased in terms of adherence to precedent, congressional acceptance of that precedent, or the "impossibility" of proceeding "without a defendant," most courts have held that the dissolution of a corporation works an abatement of pending actions.
>
> But a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing. . . . Unless the statutory terms are observed, however, the consequences of total dissolution attach, and, if we follow Oklahoma Natural Gas Co. v. Oklahoma (US) supra, and cases cited, the actions abate. (336 U.S. at pages 634-635)

More recently, in *Melrose Distillers* v. *United States*, 359 U.S. 271 (1959), a case involving a criminal prosecution under the Sherman Act, this Court stated:

> We start from the premise that in the federal domain prosecutions abate both on the death of an individual defendant (List v. Pennsylvania, 131 US 396, 33 L ed 222, 9 S Ct 794; Schreiber v Sharpless, 110 US 76, 28 L ed 65, 3 S Ct 423) and on the dissolution of a corporate defendant (Defense Supplies Corp. v Lawrence Warehouse Co. 336 U.S. 631, 634, 93 L ed 931, 934, 69 S Ct 762), unless the action is saved by statute. We need not decide whether federal law alone would be sufficient to save a federal cause of action against a corporation dissolved under state law. We have here a situation where the interplay of federal and state law makes it clear that petitioners did not escape criminal responsibility under the Sherman Act by the kind of dissolution decreed under Maryland and Delaware law.

> The Sherman Law in § 8 defines "person" to include corporations "existing" under the laws of any State. The question whether a corporation "exists" for any purpose is thus determined by reference to state law. We conclude that under both Maryland and Delaware law the lives of these corporations were not cut short, as is sometimes done on dissolution, cf. Chicago T & T. Co. v. Forty-One Thirty-Six Wilcox Bldg., Corp. 302 US 120, 82 L ed 147, 58 S Ct 125, but were sufficiently continued so that this proceeding did not abate. (359 U.S. at pages 272-273)

In this case there was no Washington statute which "saved" the actions by and against Piper & Greenhalgh, Incorporated. Consequently, the actions abated.

The legal principles set forth by this court in the above cases have been followed and applied in numerous cases by the lower federal courts. In each instance the issue has been decided by reference to the substantive law of the state of incorporation. In no instance has the rule been characterized by the court as "procedural". Examples are:

United States v. *Safeway Stores,* 140 F.2d 834, 836 (10th Cir. 1944):

> It is well settled at common law and in the federal courts that a corporation which has been dissolved is as if it did not exist. The result of dissolution cannot be distinguished from the death of a natural person in its effect. As the death of a natural person abates all pending litigation to which he is a party, dissolution of a corporation at common law abates all litigation to which the corporation is a party, unless it is continued by the law of the state where it is dissolved for the purpose of prosecuting or defending civil suits or criminal actions. *Thus the question, as to whether a cor-*

> *poration is continued for the purpose of prosecuting or defending civil suits or criminal actions, depends upon the law of its incorporation.* (Emphasis added)

Monolith Portland Midwest Co. v. *Reconstruction Finance Corp.*, 282 F.2d 439, 443 (9th Cir. 1960):

> . . . [W]e start with the basic premise that in the absence of statute an action by or against a corporation abates when the corporation goes out of existence . . .

Walder v. *Paramount Publix Corporation*, 132 F. Supp. 912, 917 (S.D. N.Y. 1955):

> The conditions of corporate dissolution are "not procedural or controlled by the rules of the court in which the litigation pends", rather they are matters which rest wholly with the State of incorporation, and over which the Federal Government has no control. Consequently, if a corporation lacks capacity to sue by reason of dissolution under State law, it cannot sue in the Federal courts even on a federally created right.

Edison Electric Light Co. v. *Westinghouse*, 34 F. 232, 232-233 (C.C. 1888):

> Under the New York statute it appears that there is no termination of the existence, or a dissolution of the complainant in relation to actions, in which it was a party, pending at the time of the consolidation.
>
> * * *
>
> The defendants, however, interpose the objection that the provision just cited is for the government of the New York courts alone, and can have no control over the equity practice in the federal courts. On such examination as we have given to the matter and to the authorities cited in the briefs of counsel, we cannot assent to this view.

> No good reason has been assigned, nor does there appear to be any, why this court should not recognize the statutory provision of New York, and apply it to the pending suit between these parties. *The question would seem to involve something more than a mere rule of practice; it embraces the legal and equitable rights of the plaintiff under the laws of the state which created it,* and prescribed the terms and conditions on which it might be consolidated with one or more corporations of the same state. . . . (Emphasis added)

Accord: *United States* v. *Union Carbide and Carbon Corporation,* 132 F. Supp. 388, 389 (D. Colo. 1955); *R. V. McGinnis Theatres & Pay T.V., Inc.* v. *Video Independent Theatres, Inc.,* 386 F.2d 592 (10th Cir. 1967) cert. den., 390 U. S. 1014 (1968); *United States* v. *P. F. Collier & Son Corp.,* 208 F.2d 936 (7th Cir. 1953); *United States* v. *United States Vanadium Corp.,* 230 F.2d 646 (10th Cir.), cert. den., 351 U. S. 939 (1956); and *United States* v. *Line Material Co.,* 202 F.2d 929 (6th Cir. 1953).

The Court of Appeals Erroneously Interprets Rule 25 in Holding That a Substitution Can Be Made to an Action Which Abated by Operation of State Law

The Court of Appeals relied primarily on Rule 25 of the Federal Rules of Civil Procedure in holding that the District Court abused its discretion in denying the motion for a substitution of shareholders for the dissolved corporation. It is, however, clear that the Court of Appeals misinterpreted Rule 25 in reaching that conclusion. Rule 25 does not determine what actions may be continued but rather sets forth the procedure for making a substitution of parties in an action which has not abated. In this case, as was pointed out above, there was no action to which a substitution could be made.

The relationship of Rule 25(a) to substantive rights is discussed at 3B Moore's Fed. Prac. (2nd Ed. 1969) 25-121, § 25.04[1], as follows:

> Rule 25(a) does not attempt to state what actions shall survive the death of a party. This is a function of substantive law and is not determined by Rule 25(a). To determine the substantive rights involved in or as a condition to substitution in a nonfederal case, the district court, under the Rules of Decision Act, as interpreted by *Erie R. Co.* v. *Tompkins,* must look to state law. . . .

Professor Moore further discusses the effect of the rule at 3B Moore's Fed. Prac. 25-141, § 25.04[3]:

> As previously discussed, Rule 25 does not determine what actions shall survive the death, etc., of a party; it deals only with the manner in which substitution is effected in an action which *does* survive under the applicable substantive law. Since Rule 25 is a valid procedural rule, it therefore follows that the terms of Rule 25, and federal court decisions interpreting its meaning, control the manner of effecting substitution in the federal courts. And conflicting state law dealing with the manner of effecting substitution in state court should not prevail over the requirements of Rule 25. This should be true whether the basis of the federal court's jurisdiction is diversity of citizenship, the presence of a federal question, or an admiralty or maritime matter.
>
> But there may be difficulty encountered by the courts in applying these principles. The problem is to distinguish between, on the one hand, a state law which determines whether an action *survives,* and, on the other hand, a state law which merely describes the *manner of effecting substitution* in state court and which should have no applicability in federal court.

At 3B Moore's Fed. Prac. 25-458, 459, § 25.10, Professor Moore specifically discusses the relationship between Rule 25 and dissolved corporate parties:

> . . . Now we turn to the question of the effect of Rule 25 upon the situation where a corporate party in a federal action is dissolved, or the subject of a merger, or acquisition, etc. during the course of the litigation. It would seem that if under the applicable law the action absolutely abates without the possibility of revivor, Rule 25 can have no effect, since Rule 25 only operates where by the applicable law the action can continue subject to the application of the requirements of Rule 25. . . .

The conclusion of Professor Moore is fully supported by the decision of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257, 259-260 (1927).

The Cases Relied Upon by the Court of Appeals Do Not Support the Conclusion That Parties Can Be Substituted to an Abated Action

The Court of Appeals cites numerous cases and Rule 25(c) of the Federal Rules of Civil Procedure for the proposition that "[a] district court has ample discretionary power to substitute parties plaintiff where a corporate dissolution or some other act affecting the capacity to sue has occurred during the pendency of an action. *Brown* v. *Keller,* 274 F.2d 779 (6th Cir. 1960); *Feener Business Schools* v. *Speedwriting Pub. Co.,* 249 F.2d 609 (1st Cir. 1957); *United States* v. *Koike,* 164 F.2d 155 (9th Cir. 1947); *United States* v. *Hirahara,* 164 F.2d 157 (9th Cir. 1947); *Killebrew* v. *Moore,* 41 F.R.D. 269 (N.D. Miss. 1966); Fed. R. Civ. P. 25(c)." However, none of those cases supports the conclusion that a federal district court has the power

to substitute parties in an action *which has abated* by reason of the dissolution of a corporate party.

Koike and *Hirahara* involved actions by Porter, the Price Administrator, Office of Price Administration, to recover damages for violations of maximum price regulations. It was held that Porter's successor in office should have been substituted as plaintiff in the actions under Rule 25(d) of the Federal Rules of Civil Procedure. It also held that the United States could be substituted pursuant to the provisions of the Emergency Price Control Act. *Brown* was concerned with a motion to dismiss under Rule 9(a) of the Federal Rules of Civil Procedure, not a substitution of parties to an abated action. There, an additional party plaintiff was joined in the action four months prior to the time that trustee-plaintiffs of an employees' retirement fund ceased to be trustees. The court held that there was a plaintiff entitled to go forward with the action and thus it should not have been dismissed.

In *Killebrew,* plaintiffs, partners in a grocery store, after instituting a lawsuit against Moore, sold their interest in the store to six other people. Plaintiffs and their purchasers filed a motion under Rule 25(c) of the Federal Rules of Civil Procedure to either substitute the purchasers or to join them as parties plaintiff. The action did not abate by reason of the transfer. It was capable of being continued by the original plaintiffs, and, therefore, the court directed the purchasers to be *joined with* the original parties.

Nor does *Feener Business Schools* in any way support the Court of Appeals' conclusion. There, the parent New York corporation, having absorbed its wholly owned subsidiary (also a New York corporation) by merger, was allowed to be substituted for the "original nominal plaintiff", the court relying upon the rules

set forth in *United States* v. *United States Vanadium Corp.*, 230 F.2d 646 (10th Cir.), cert. den., 351 U.S. 939 (1956). The court in *Vanadium* stated:

> There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died. It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporation. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts. (230 F.2d at p. 648)

It then applied the pertinent New York statute which specifically provided that "no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party . . . shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation has been entered into; . . ." *As has been correctly determined by the District Court and the Court of Appeals, there was no such statute in effect in Washington at the time of the dissolution of Piper & Greenhalgh, Incorporated.* The Court of Appeals' conclusion that the District Court has ample discretionary power to substitute parties to an abated action is incorrect. The District Court has *no* power to substitute parties in such a case.

Finally, the Court of Appeals' reliance upon Rule 25(c) of the Federal Rules of Civil Procedure is misplaced. Rule 25(c) relating to a transfer of interests refers to a transfer by one of the parties to an action and not one that occurs by operation of law. *Hofheimer* v. *McIntee,* 179 F.2d 789 (7th Cir.), cert. den., *sub nom. Johnston* v. *McIntee,* 340 U.S. 817, reh. den., 340 U.S. 885 (1950); *A. R. Young Const. Co.* v. *Dunne,* 254 Pac. 323 (Kan. 1927). In fact the wording of Rule 25(c) itself makes it clear that the action must be one which is capable of being continued against a transferor before a court can consider whether to join or substitute a transferee.

CONCLUSION

It is respectfully submitted that the decision of the Ninth Circuit Court of Appeals misinterprets and disregards the controlling substantive law of the State of Washington and is contrary to the opinions of this Court and that a review is warranted by this Court.

The Writ of Certiorari should issue.

Respectfully submitted,

RICHARD S. WHITE
1610 Washington Building
Seattle, Washington 98101
Attorneys for Petitioners F. D. Rich Company, Incorporated and American Surety Company

Of Counsel:

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON

JOHN E. EDERER
1610 Washington Building
Seattle, Washington 98101

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23,752, 23,753

UNITED STATES OF AMERICA for the use of ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation,
Appellant and Cross-Appellee,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; B & G CONSTRUCTORS, INCORPORATED,
Appellees and Cross-Appellants,

AMERICAN SURETY COMPANY,
Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Appellant and Cross-Appellee,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,
Appellee and Cross-Appellant.

[December 28, 1970]

Appeal from the United States District Court for the Western District of Washington, Southern Division

Before: HAMLEY and WRIGHT, Circuit Judges, and GOODWIN, District Judge.*

* The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

GOODWIN, District Judge:

In an action by a subcontractor for damages against the prime contractor on an army housing project, the subcontractor appeals from a judgment notwithstanding the verdict.

The district court separated the issues of liability and damages. The jury found in favor of the plaintiff subcontractor on the issue of liability. The damages issues were then referred to a special master, who computed damages. The court modified the master's findings and entered the challenged judgment in favor of the prime contractor notwithstanding the verdict in favor of the subcontractor. Both parties seek review of various trial court rulings.

The dispute arises out of a subcontract entered into by Acme Granite & Tile Company, a division of Piper & Greenhalgh, Inc., and F. D. Rich Company, the prime contractor on a government contract for the construction of some five hundred "Capehart" homes at Fort Lewis, Washington. (The project was funded pursuant to the Capehart Act, 42 U.S.C. §§ 1594-1594k.)

The subcontract specified that Acme was to "[f]urnish all labor, materials and equipment required to complete all lathing, plastering and ceramic tile work as per plans and specifications * * *." The work was to be supervised and approved by a designated representative of the U. S. Army Corps of Engineers. One provision of the subcontract required Acme to proceed with work on the written order of Rich regardless of any dispute about payment.

Acme obtained a surety bond from Fireman's Fund Insurance Company and began work. The sequence of construction called for a framing subcontractor, B & G Constructors, Inc., to frame the houses, with Acme to follow in each house with the plaster and tile work.

Because of defective framing by B & G, the Army inspector revoked his approval of certain houses on which Acme was working. The framing was out of plumb and not parallel. The engineer rejected some fifty units and warned Acme that further plastering over defective framing would meet with similar rejection.

Protests by Acme to Rich resulted in conferences and exchanges of letters. The quality of B & G's corrective measures was in dispute. An impasse developed and Acme refused to proceed. On March 11, Rich declared Acme in default and employed Sunset Tile Company to finish the work. A new Corps of Engineers inspector was appointed to replace the engineer who had found fault with B & G's work. There were no more work stoppages.

Following Rich's termination of Acme's subcontract, Acme was ultimately forced into bankruptcy and liquidation. In the meantime Acme had brought an action against Rich asserting a lien claim for $57,446.46 in unpaid progress payments. Acme also asserted a claim later determined to be worth some $17,000 representing the value of the plastering, lathing and tiling work converted to Rich's use by Sunset after Acme's contract was terminated, and a claim for some $100,000 in consequential damages resulting from Rich's "unjustified termination" of the contract. Rich counterclaimed against Acme for some $20,000 in increased costs resulting from Acme's refusal to continue work, and brought B & G and its holding company into the action by asserting a third-party claim against them contingent upon Rich's own liability to Acme. B & G also asserted a claim against Acme for damages for delay allegedly caused by Acme.

At the conclusion of a trial which generated thirty-four volumes of testimony, the jury returned a special verdict in favor of Acme.

Counsel for Rich filed alternative motions for judgment n.o.v. and a new trial, and also filed a motion to dismiss

Acme's action on ground that, because the Acme corporation was dissolved while the litigation was in progress, its action automatically abated under Washington law.

Counsel for Acme asserted that the corporate dissolution was the result of a misunderstanding between counsel, the corporation's accountant, and Acme's trustee on liquidation. Counsel filed with the trial court a motion to substitute Acme's two sole stockholders, Piper and Greenhalgh, in place of the defunct corporation. This motion was denied, and the court ordered Acme's action abated.

The applicable Washington law then provided that dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. *United States* v. *Spokane Mill Co.*, 206 F. 999 (E.D. Wash. 1913). This law has since been changed, but the change has no retroactive force. See RCW 23A.28.250. The difficult question, however, is whether under Fed. R. Civ. P. 25(c) the motion to substitute parties, made by the two stockholders of the dissolved corporate plaintiff, should have been allowed by the district court.

A district court has ample discretionary power to substitute parties plaintiff where a corporate dissolution or some other act affecting the capacity to sue has occurred during the pendency of an action. *Brown* v. *Keller,* 274 F.2d 779 (6th Cir. 1960); *Feener Business Schools* v. *Speedwriting Pub. Co.,* 249 F.2d 609 (1st Cir. 1957); *United States* v. *Koike,* 164 F.2d 155 (9th Cir. 1947); *United States* v. *Hirahara,* 164 F.2d 157 (9th Cir. 1947); *Killebrew* v. *Moore,* 41 F.R.D. 269 (N.D. Miss. 1966); Fed. R. Civ. P. 25(c). Were it not for such a power of substitution, valuable property rights involved in litigation could simply disappear. Such a result would be at odds with both common sense and state law. See, e.g., *Ban-Mac, Inc.* v. *King County,* 69 Wash. 2d 49, 416 P.2d 694 (1966); *Taylor* v. *Interstate Inv. Co.,* 75 Wash. 490, 135 P. 240 (1913).

Under Washington law, the dissolution of a corporate entity does not necessarily relieve the corporation's assets or the stockholders who receive them from liability to its creditors. *Mayflower Realty Co.* v. *Security Savings & Loan Soc.*, 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel. Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

Counsel for Acme argues strenuously that the dissolution was simply the product of a misunderstanding between himself and the accountant, and that he informed the trial court of the dissolution as soon as he knew of it himself. He also argues that because Acme was fully bonded Acme's stockholders had no motive to attempt to escape liability. Whether or not this last argument has merit, however, depends upon subrogation agreements and legal principles that have not been litigated below and are not before us. In any event, there is no evidence that the dissolution could have prejudiced Rich, or that it was a "fraud upon the court." Fireman's Fund, as surety, is entitled to due process. The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders.

Protection of those beneficially interested in the floundering corporation was well within the equity powers of the court. *Bacon* v. *Robertson*, 59 U.S. 480 (1855). On all the facts of this case we are reluctantly compelled to conclude that the district court abused its discretion in denying the motion for a substitution of parties plaintiff and in leaving the corporation's surety vulnerable to a judgment on a counterclaim with no right of set-off.

The next question is whether entry of judgment notwithstanding the verdict was proper. We hold that it was not. The jury could reasonably have concluded that Acme's witnesses were telling the truth.

Questions as to the consistency and credibility of witnesses are obviously within the province of the jury. The fact that this court might reach a different result than the jury reached would not authorize us to affirm a judgment notwithstanding the verdict. Unless there is no substantial evidence to support the jury's conclusions, the verdict must stand, subject, of course, to the right of the district court to grant a new trial under Fed R. Civ. P. 59.

We are not persuaded by Rich's argument that the only question involved in this case is the legal interpretation of the subcontract between Rich and Acme. Factual issues had to be resolved by a jury. It is true that Article V of the contract required Acme to proceed with work and not delay the whole project while it argued over compensation. But this provision of the contract may have been modified by the conduct of the parties. Also, the argument between the parties may not have been entirely a dispute over payment. In part, the dispute concerned the quality of performance and the impossibility of continued performance. In any event, there was a question of fact whether Rich, by its failure to have B & G correct the defective framing job, prevented Acme from going ahead with its obligations under the contract. If Rich, through another subcontractor, prevented Acme's performance, Rich cannot be heard to complain of Acme's nonperformance. *Wolk* v. *Bonthius,* 13 Wash. 2d 217, 124 P.2d 553 (1942); *Mogul Logging Co.* v. *Smith Livesey Wright Co.,* 185 Wash. 509, 55 P.2d 1061 (1936); *Blair* v. *Wilkinson Coal & Coke Co.,* 54 Wash. 334, 103 P. 18 (1909).

Rich relies heavily on *Stoeckert* v. *United States,* 391 F.2d 639 (Ct. Cl. 1968), for the proposition that only legal questions are involved. However, in *Stoeckert,* the subcontractor refused to proceed with work in spite of the government inspector's urgent pleas that it do so. Here, the jury could have believed that the government inspector told Acme that its work would be rejected if Acme proceeded.

Something more than a legal interpretation of Acme's contractual duties, therefore, is involved in this case. A breach of contract by Rich may well have occurred before Acme refused to proceed. Reasonable men might differ as to which party first breached its obligation under the agreement and prevented the other from performing its duties. This is the kind of factual question that should be decided by the jury.

We conclude that the judgment notwithstanding the verdict was error. This conclusion, however, does not permit us to reinstate the verdict.

At the end of the case, the trial court granted an alternative motion for a new trial, to take effect only if the judgment n.o.v. should be reversed.

A motion for a new trial is addressed to the sound discretion of the trial judge, and must be left standing by this court absent a showing of abuse of discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940); and see cases in 6A Moore, Federal Practice § 59.08(5), pp. 3814-3821 (2d ed. 1966). No showing has been made that the district court abused its discretion in granting the motion for new trial. Therefore, under established rules of appellate review, we remand this case to the district court for a second trial in accordance with the order granting the motion for new trial.

Reversed and remanded.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
U. S. COURT OF APPEALS AND POST OFFICE BUILDING
7TH & MISSION STREETS, P. O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Dec. 28, 1970

Re: Nos. 23744, 23745, 23752, 23753, USA, et al.
v. F. D. Rich Co., et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered reversing and remanding the judgment or order of the court below (or administrative agency). You have 14 days from this date to file a petition for rehearing if you wish to do so.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

WM. B. LUCK,
Clerk of Court

(This letter indicates that the judgment was by docket entry December 28, 1970 pursuant to Rule 36 of the Federal Rules of Appellate Procedure.)

[Richard S. White
John E. Ederer
Helsell, Paul, Fetterman, Todd & Hokanson
1610 Washington Building
Seattle, Washington 98101
MU 2-3850

Attorneys for F. D. Rich Company, Incorporated and American Surety Company]

[FILED APRIL 8, 1971]

UNITED STATES COURT OF APPEALS.
FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23,752, 23,753

UNITED STATES OF AMERICA for the use of ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation,

Appellant and Cross-Appellee,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; B & G CONSTRUCTORS, INCORPORATED,

Appellees and Cross-Appellants,

AMERICAN SURETY COMPANY,

Appellee,

FIREMAN'S FUND INSURANCE COMPANY,

Appellant and Cross-Appellee,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,

Appellee and Cross-Appellant.

Opinion on Petition for Rehearing

Before: HAMLEY and WRIGHT, Circuit Judges, and GOODWIN, District Judge.*

PER CURIAM:

In a petition for rehearing, F. D. Rich Company, Incorporated, urges that this court has erred in the application of state law.

---

* The Honorable Alfred T. Goodwin, District Judge for the Distric of Oregon, sitting by designation.

As noted in our opinion of December 28, 1970, Washington law provided when the case was tried in the District Court that the dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. Washington law with reference to the rights of creditors and shareholders of dissolved corporations makes it clear, however, that even though a procedural rule formerly abated a pending action in the state court, the rights of shareholders and creditors were not necessarily obliterated by the dissolution of the corporate entity. *Mayflower Realty Co.* v. *Security Savings & Loan Soc.*, 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel. Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

As noted in our opinion of December 28, 1970, the District Court was not bound by the procedural law of the State of Washington, but was bound by the Federal Rules of Civil Procedure. Under the Federal Rules, it is clear that the District Court had ample authority to dispose of the case on its merits by the substitution of parties if necessary.

There is no conflict between our opinion and the substantive law of the State of Washington. There is some federal case authority prior to 1938, when the Conformity Acts were still in force, which supports the petitioner's view that certain local procedural laws apply in the district court. See *Oklahoma Gas Co.* v. *Oklahoma*, 273 U.S. 257, 259-60 (1927) (dictum); *United States* v. *Spokane Mill Co.*, 206 F. 999 (1913). These cases have been rendered obsolete by the adoption of the Federal Rules of Civil Procedure.

We adhere to the views expressed in the original opinion. The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

No. 2990

THE UNITED STATES FOR THE USE AND BENEFIT OF ACME GRANITE & TILE COMPANY, a Division of Piper & Greenhalgh, Inc., a Washington corporation, *Plaintiff*,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; et al, *Defendants*,

and

FIREMAN'S FUND INSURANCE COMPANY; UNITED STATES FIDELITY & GUARANTY COMPANY, *Defendant to Counterclaim and Cross-Claim.*

Stipulation as to Facts Pertaining to Corporate Status of Plaintiff Piper & Greenhalgh, Inc.

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that the following are the true and correct facts that pertain to a determination of the status of plaintiff Piper & Greenhalgh, Inc.:

April 10, 1963	Piper & Greenhalgh, Inc. (for its division Acme) files complaint in the instant action #2990
October 18, 1965	Val Greenhalgh and George Piper sign resolution for voluntary dissolution of plaintiff corporation Piper & Greenhalgh, Inc.
	Greenhalgh, et ux and Piper, et ux sole stockholders of plaintiff corporation and owners of all capital stock thereof.

November 10, 1965	Dissolution resolution filed by attorneys for plaintiff, Cooper and Cooper, with Secretary of State of Washington.
December 31, 1965	Piper, as liquidating trustee for dissolved corporation, certifies "all obligations of the corporation have been paid and all assets of the corporation distributed to stockholders and for all purposes the corporation has been fully liquidated."
February 18, 1966	(8 months prior to trial commencing October 17, 1966) Secretary of State issues certificate of final dissolution.
	At no time have proceedings been taken or document executed purporting to transfer the cause of action asserted by Acme in Cause No. 2990.
	Numerous documents filed in this court since February 18, 1966 represent continued existence of plaintiff corporation.
August 9, 1966	In affidavit Greenhalgh testifies he is a majority stockholder "in Piper & Greenhalgh, Inc., a Washington corporation.".
October 17, 1966	Trial commences. In trial testimony Greenhalgh testifies to residence in Canada. In pretrial deposition Greenhalgh testified to residence in Everett, Washington. Greenhalgh testimony at trial prompts White of attorneys for Rich to make inquiry at Secretary of State's office concerning status of plaintiff corporation.

November 2, 1966 Verdict of jury returned.

November 4, 1966 Ederer, associate of White, advised by Secretary of State that plaintiff corporation was finally dissolved as of February 18, 1966.

No facts re dissolution of plaintiff corporation reported or intimated in any way to the Court prior to filing of memoranda on post-verdict motions.

DATED: January 25, 1967.

RALPH B. POTTS
Ralph B. Potts, Attorney for plaintiff.

JOHN E. EDERER
Of Helsell, Paul, Fetterman, Todd & Hokanson, Attorneys for F. D. Rich Company, Incorporated.

MERRIFIELD B. REES
Of McCormick, Hoffman & Rees, Attorneys for B & G Constructors

APPROVED: January 26, 1967.

GEORGE H. BOLDT
George H. Boldt, United States District Judge

Full story not here.

Otherwise approved.
GEORGE P. PIPER
V. B. GREENHALGH

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APR 27 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1640~~ 70-136

F. D. RICH COMPANY, INCORPORATED, a corporation doing business in the state of Washington and AMERICAN SURETY COMPANY, *Petitioners,*

v.

ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation; B & G CONSTRUCTORS, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANY; and UNITED STATES FIDELITY & GUARANTY COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD S. WHITE
1610 Washington Building
Seattle, Washington 98101

Attorneys for Petitioners F. D. Rich Company, Incorporated and American Surety Company

Of Counsel:

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON

JOHN E. EDERER
1610 Washington Building
Seattle, Washington 98101

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

F. D. RICH COMPANY, INCORPORATED, a corporation doing business in the state of Washington and AMERICAN SURETY COMPANY, *Petitioners,*

v.

ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation; B & G CONSTRUCTORS, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANY; and UNITED STATES FIDELITY & GUARANTY COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on December 28, 1970.

OPINIONS BELOW

The District Court for the Western District of Washington delivered no written opinion aside from the Findings of Fact, Conclusions of Law, and Judgment entered in that court. The opinion of the Court of Appeals which reversed and remanded the judgment

of the District Court is printed in the Appendix hereto at pages 1a-7a and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on December 28, 1970, a copy of which judgment is appended to this petition at page 8a of the Appendix. On January 26, 1971, the Court of Appeals issued its Order extending until February 1, 1971, the time in which petitioners could file a petition for rehearing. Said petition for rehearing was filed on February 1, 1971 and is still pending. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Rule 25 of the Federal Rules of Civil Procedure overrides the substantive law of the State of Washington so as to permit a federal court to direct the substitution of shareholders for a dissolved corporate plaintiff in an action which, under Washington law, abated upon the dissolution of the corporation.

FEDERAL RULE INVOLVED

The pertinent portions of Rule 25 of the Federal Rules of Civil Procedure involved herein are as follows:

> Rule 25. *Substitution of Parties.*
>
> (a) *Death.*
>
> (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together

with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

* * * *

(c) *Transfer of Interest.* In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the District Court of the United States for the Western District of Washington, Southern Division was Title 28 U.S.C., Section 1332 and Title 42 U.S.C., Section 1594.

This action was instituted by Piper & Greenhalgh, Incorporated, a subcontractor on an army federal defense housing project contract, for damages, and included sizeable counterclaims and cross-claims by F. D. Rich Company, Incorporated (hereinafter petitioner

Rich) and B&G Constructors, Incorporated (hereinafter B&G). It stems from contractual disputes experienced during construction of a 500-unit housing project for military personnel at Fort Lewis, Washington in 1962-1963. The general contractor, petitioner Rich, undertook with the United States to construct the project in 540 calendar days for $7,664,827. The controversy centers on termination by petitioner Rich of its lathing, plastering and tiling subcontractor, Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, following the latter's refusal to continue its work on the project.

The pivotal facts pertaining to the questions presented in this petition were stipulated, which stipulation is printed at pages 9a-11a of the Appendix hereto. The action was begun in 1963 by Acme Granite & Tile Company, a division of Piper & Greenhalgh, Incorporated, a Washington corporation organized pursuant to the Revised Code of Washington, Title 23. On October 18, 1965, a resolution for voluntary dissolution of Piper and Greenhalgh, Incorporated, was adopted by Val B. Greenhalgh and George Piper, represented in the acknowledgment thereto to be "the holders of all the capital stock." (Record 1088-1090). This resolution was filed by their attorneys with the Secretary of State of the State of Washington on November 10, 1965 in compliance with RCW 23.01.530. On February 18, 1966, eight months before trial, the Secretary of State issued a certificate of final dissolution. This order declared Piper & Greenhalgh, Incorporated to be dissolved pursuant to RCW 23.01.630. Under the express wording of that statute, ". . . thereupon the corporate existence . . . terminate[d]". *There was then no Washington statute which prolonged the life of the corporation for litigation purposes.*

Neither Piper & Greenhalgh, Incorporated, its stockholders nor its attorneys brought the fact of dissolution to the attention of the District Court or petitioners. On the contrary, through numerous filings in the District Court after final dissolution, including the affidavit testimony of Val B. Greenhalgh, it was falsely represented that the plaintiff was a viable Washington corporation.

By agreement the issues of liability and damages were severed. Trial of the liability issues commenced on October 7, 1966 before a jury, which returned a verdict in favor of Piper & Greenhalgh, Incorporated against petitioners, B & G and B & G's surety. The District Court granted petitioners' motion for judgment notwithstanding the verdict and alternatively granted petitioners' motion for new trial. The Court of Appeals reversed the judgment notwithstanding the verdict and affirmed the District Court's order granting the motion for new trial. Petitioners do not seek review of that portion of the decision by this petition.

After the trial on liability, through chance, counsel for petitioners learned of the dissolution of Piper & Greenhalgh, Incorporated. Accordingly, petitioners moved for dismissal of the actions by and against the dissolved corporation on the ground that they had abated by operation of law. George Piper and Val B. Greenhalgh moved to be substituted in place of the corporation.

The District Court conducted a special post-trial hearing on the issues of abatement and substitution of parties (Liability Transcript 1658-1703). After briefs were submitted, the court issued its oral opinion, granting petitioners' motion to dismiss and denying the mo-

tion for substitution (Liability Transcript 1711-16). Formal findings and an order abating the action as to Piper & Greenhalgh, Incorporated and denying the motion to substitute parties were thereafter entered (Record 1415-23).

The Court of Appeals reversed. While acknowledging that the applicable Washington law then provided that the dissolution of a corporation *abated* any action in which the dissolved corporation was a plaintiff, the Court of Appeals held that under Rule 25(c) of the Federal Rules of Civil Procedure, the motion to substitute parties, made by two of the stockholders of the dissolved plaintiff, should have been allowed by the District Court.

REASONS FOR GRANTING WRIT AND ARGUMENT

A. REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals should be reviewed because it erroneously interprets Rule 25 of the Federal Rules of Civil Procedure as giving a federal court the power to continue in existence by the procedural device of substitution an action which, upon dissolution of a corporate party, has abated under the substantive law of the state of incorporation. Such a decision, if allowed to stand, would permit encroachment by the federal judiciary, through court rules, on a matter exclusively within the province of the state which brought the corporation into being.

2. The decision of the Court of Appeals, insofar as it considers the continued existence of, and substitution of parties to, an action which has abated under Washington law to be within the discretion of the District

Court, erroneously brushed aside substantive state law as enunciated by the Supreme Court of the State of Washington in *State ex rel. National Surety Co.* v. *Superior Court,* 180 Wash. 587, 41 P.2d 133 (1935) and *Columbia Building Co.* v. *National Surety Co.,* 194 Wash. 51, 76 P.2d 1027 (1938), to apply a federal procedural rule.

3. The decision directing the substitution of shareholders for a dissolved corporation in an action which abated under applicable Washington law, is in direct conflict with the decisions of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257 (1927); *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.,* 302 U.S. 120 (1937); and *National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609 (1875).

4. The decision is in conflict with the Court of Appeals, Tenth Circuit, in *United States* v. *United States Vanadium Corp.,* 230 F.2d 646, cert. den., 351 U.S. (1956) and *R. V. McGinnis Theatres & Pay T.V., Inc.* v. *Video Independent Theatres, Inc.,* 386 F.2d 592 (1967), cert. den., 390 U.S. 1014 (1968).

B. ARGUMENT

The District Court and the Court of Appeals Correctly Held That the Actions by and Against Piper & Greenhalgh, Inc. Abated Upon Its Dissolution

Petitioners agree with the District Court and the Court of Appeals that the law of Washington, the state of incorporation of Piper & Greenhalgh, Incorporated, applies in determining the effect of the dissolution of Piper & Greenhalgh, Incorporated upon pending actions. *United States* v. *Spokane Mill Co.,* 206 F. 999 (E.D. Wash. 1913); *Oklahoma Natural Gas Co.* v.

Oklahoma, 273 U.S. 257 (1927). Petitioners further agree with the Court of Appeals' conclusion that the applicable law of Washington in existence at the time of dissolution of Piper & Greenhalgh, Incorporated, was the common-law rule that such dissolution abated any action in which the dissolved corporation was appearing either as plaintiff or defendant. *State ex rel. National Surety Co.* v. *Superior Court,* 180 Wash. 587, 41 P.2d 133 (1935) and *Columbia Building Co.* v. *National Surety Co.,* 194 Wash. 51, 76 P.2d 1027 (1938). It is submitted, however, that once that determination is made it must be concluded that no court had the power to grant a motion for the substitution of parties.

An Action Which Abates by Operation of Law Has No Further Existence for Any Purpose

In reaching its decision the Court of Appeals considered the continued existence of, and the substitution of parties to, an action which had abated under the appropriate state law to be within the discretion of the District Court. At page 3 of the opinion (Appendix, p. 4a) it states that "the [district] court ordered Acme's action abated." At page 4 of the opinion (Appendix, p. 5a) the court held:

> . . . The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders.

The District Court did not abate the action. The dissolution of the corporation during the pendency of the action abated the action *by operation of law. United States* v. *Spokane Mill Co., supra; National Bank* v. *Colby,* 88 U.S. (21 Wall.) 609 (1875). The District Court could not have abated the action any

more than it could have continued the action once it had abated under the applicable state law. That was exclusively a matter of state law as was held by this Court in *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg., Corp.*, 302 U.S. 120, 127-128 (1937):

> How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. [citations omitted] The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

Abatement of an action by reason of the dissolution of a corporate party effectively puts an end to the suit and arrests all procedure therein. 16A Fletcher Cyclopedia, Corporations (1962, Rev. Vol.) 348, § 8150. The Washington Court has adopted the common law rule as to the effect of an abatement in *Gordon* v. *Hillman*, 109 Wash. 223, 232-233, 186 Pac. 651 (1919):

> . . . At common law all actions pending abated upon the death of a necessary party. If the cause of action was one that did not survive, death finally ended the action; but if the cause of action was one that did survive, a new action by or against the personal representative of the deceased party was necessary to prosecute the remedy.

The rule is similarly discussed in *Leiserson & Adler, Inc.* v. *Keam,* 266 S.W.2d 352 (Ky. 1954), as follows:

> As the death of the natural person abates all pending litigation to which such a person is a party, by like token the dissolution of a corporation at common law abates all litigation in which the corporation appears either as plaintiff or defendant. See 1 Am.Jur., Abatement and Revival, Section 56, page 59. A clear statement on this subject relative to a corporation is set forth in *MacAffer* v. *Boston & Maine R.R. Co.,* 242 App. Div. 140, 273 N.Y.S. 679, 686, in this language: "At common law every real or personal action abated on the death of either the sole plaintiff or the sole defendant before verdict and judgment, and this is still the law except insofar as the common-law has been modified by statute. (Citing cases.) Justice Story, in *Mumma* v. *Potomac Co.,* 8 Pet. 281, 286, 8 L.Ed. 945, said 'There is no pretense to say that, a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than a dead man.' The dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued. (266 S.W.2d at p. 354)

Once it was determined that the action had abated as a matter of Washington law the District Court properly entered an order dismissing the actions by and against Piper & Greenhalgh, Incorporated.

The Court of Appeals Erroneously Interprets Rule 25 in Holding That a Substitution Can Be Made to an Action Which Abated by Operation of State Law

The Court of Appeals relied primarily on Rule 25 of the Federal Rules of Civil Procedure in holding that the District Court abused its discretion in denying the motion for a substitution of shareholders for the dissolved corporation. It is, however, clear that the Court

of Appeals misinterpreted Rule 25 in reaching that conclusion. Rule 25 does not determine what actions may be continued but rather sets forth the procedure for making a substitution of parties in an action which has not abated. *In this case there was no action to which a substitution could be made.*

The relationship of Rule 25(a) to substantive rights is discussed at 3B Moore's Fed. Prac. (2nd Ed. 1969) 25-121, § 25.04[1], as follows:

> Rule 25(a) does not attempt to state what actions shall survive the death of a party. This is a function of substantive law and is not determined by Rule 25(a). To determine the substantive rights involved in or as a condition to substitution in a nonfederal case, the district court, under the Rules of Decision Act, as interpreted by *Erie R. Co.* v. *Tompkins,* must look to state law. . . .

Professor Moore further discusses the effect of the rule at 3B Moore's Fed. Prac. 25-141, § 25.04[3]:

> As previously discussed, Rule 25 does not determine what actions shall survive the death, etc., of a party; it deals only with the manner in which substitution is effected in an action which *does* survive under the applicable substantive law. Since Rule 25 is a valid procedural rule, it therefore follows that the terms of Rule 25, and federal court decisions interpreting its meaning, control the manner of effecting substitution in the federal courts. And conflicting state law dealing with the manner of effecting substitution in state court should not prevail over the requirements of Rule 25. This should be true whether the basis of the federal court's jurisdiction is diversity of citizenship, the presence of a federal question, or an admiralty or maritime matter.

> But there may be difficulty encountered by the courts in applying these principles. The problem is to distinguish between, on the one hand, a state law which determines whether an action *survives,* and, on the other hand, a state law which merely describes the *manner of effecting substitution* in state court and which should have no applicability in federal court.

At 3B Moore's Fed. Prac. 25-458, 459, § 25.10, Professor Moore specifically discusses the relationship between Rule 25 and dissolved corporate parties:

> . . . Now we turn to the question of the effect of Rule 25 upon the situation where a corporate party in a federal action is dissolved, or the subject of a merger, or acquisition, etc. during the course of the litigation. It would seem that if under the applicable law the action absolutely abates without the possibility of revivor, Rule 25 can have no effect, since Rule 25 only operates where by the applicable law the action can continue subject to the application of the requirements of Rule 25. . . .

The conclusion of Professor Moore is fully supported by the decision of this Court in *Oklahoma Natural Gas Co.* v. *Oklahoma,* 273 U.S. 257, 259-260 (1927), where it was held:

> *There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation.* It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. [citations omitted] It follows, therefore, that as the death of the natural person

abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.* (Emphasis added)

The Cases Relied Upon by the Court of Appeals Do Not Support the Conclusion That Parties Can Be Substituted to an Abated Action

The Court of Appeals cites numerous cases and Rule 25(c) of the Federal Rules of Civil Procedure for the proposition that "[a] district court has ample discretionary power to substitute parties plaintiff where a corporate dissolution or some other act affecting the capacity to sue has occurred during the pendency of an action. *Brown* v. *Keller,* 274 F.2d 779 (6th Cir. 1960); *Feener Business Schools* v. *Speedwriting Pub. Co.,* 249 F.2d 609 (1st Cir. 1957); *United States* v. *Koike,* 164 F.2d 155 (9th Cir. 1947); *United States* v. *Hirahara,* 164 F.2d 157 (9th Cir. 1947); *Killebrew* v. *Moore,* 41 F.R.D. 269 (N.D. Miss. 1966); Fed. R. Civ. P. 25(c)." However, none of those cases supports the conclusion that a federal district court has the power to substitute parties in an action *which has abated* by reason of the dissolution of a corporate party.

Koike and *Hirahara* involved actions by Porter, the Price Administrator, Office of Price Administration, to recover damages for violations of maximum price regulations. It was held that Porter's successor in office should have been substituted as plaintiff in the actions under Rule 25(d) of the Federal Rules of Civil Procedure. It also held that the United States could be substituted pursuant to the provisions of the Emergency Price Control Act. *Brown* was concerned with a motion to dismiss under Rule 9(a) of the Federal Rules of Civil Procedure, not a substitution of parties to an abated action. There, an additional party plaintiff was joined in the action four months prior to the time that trustee-plaintiffs of an employees' retirement fund ceased to be trustees. The court held that there was a plaintiff entitled to go forward with the action and thus it should not have been dismissed.

In *Killebrew,* plaintiffs, partners in a grocery store, after instituting a lawsuit against Moore, sold their interest in the store to six other people. Plaintiffs and their purchasers filed a motion under Rule 25(c) of the Federal Rules of Civil Procedure to either substitute the purchasers or to join them as parties plaintiff. The action did not abate by reason of the transfer. It was capable of being continued by the original plaintiffs, and, therefore, the court directed the purchasers to be *joined with* the original parties.

Nor does *Feener Business Schools* in any way support the Court of Appeals' conclusion. There, the parent New York corporation, having absorbed its wholly owned subsidiary (also a New York corporation) by merger, was allowed to be substituted for the "original nominal plaintiff", the court relying upon the rules set forth in *United States* v. *United States Vanadium*

Corp., 230 F.2d 646 (10 Cir.), cert. den., 351 U.S. 939. The court in *Vanadium* stated:

> There is no conflict in the basic principles of law which must guide us in seeking the correct answer. Thus it is established without exception that at common law, upon dissolution, a corporation ceases to exist for all purposes. It can no more be sued civilly or prosecuted criminally than can a natural person who has died. It is equally well established that such common law status relating to dissolved corporations has been modified and changed by statute in the various states and that under such statutes proceedings and actions as authorized thereby may be maintained against such corporation. Also well settled is the principle that in determining whether upon dissolution the life of a corporation comes to an end for all purposes or whether it remains in a state of suspended animation so to speak for the purposes of the statute, we look to the state law and its construction by the state courts. (230 F.2d at p. 648)

It then applied the pertinent New York statute which specifically provides that "no action or proceeding then pending before any court or tribunal in which any constituent corporation is a party . . . shall abate or be discontinued by reason of such consolidation, but may be prosecuted to final judgment, as though no consolidation has been entered into; . . ." *As has been correctly determined by the District Court and the Court of Appeals, there was no such statute in effect in Washington at the time of the dissolution of Piper & Greenhalgh, Incorporated.* The Court of Appeals' conclusion that the District Court has ample discretionary power to substitute parties to an abated action is incorrect. The District Court has *no* power to substitute parties in such a case.

Finally, the Court of Appeals' reliance upon Rule 25(c) of the Federal Rules of Civil Procedure is mis-

placed. Rule 25(c) relating to a transfer of interests refers to a transfer by one of the parties to an action and not one that occurs by operation of law. *Hofheimer* v. *McIntee,* 179 F.2d 789 (7th Cir), certiorari denied, *sub. nom. Johnston* v. *McIntee,* 340 U.S. 817, reh den, 340 U.S. 885 (1950); *A. R. Young Const. Co.* v. *Dunne,* 254 Pac. 323 (Kan. 1927). In fact the wording of Rule 25(c) itself makes it clear that the action must be one which is capable of being continued against a transferor before a court can consider whether to join or substitute a transferee.

CONCLUSION

It is respectfully submitted that the decision of the Ninth Circuit Court of Appeals that the District Court abused its discretion in denying the motion for substitution of parties plaintiff disregards the controlling substantive law of the State of Washington and is contrary to the opinions of this Court and that a review is warranted by this Court.

The Writ of Certiorari should issue.

Respectfully submitted,

RICHARD S. WHITE
1610 Washington Building
Seattle, Washington 98101

Attorneys for Petitioners F. D. Rich Company, Incorporated and American Surety Company

Of Counsel:

HELSELL, PAUL, FETTERMAN, TODD & HOKANSON

JOHN E. EDERER
1610 Washington Building
Seattle, Washington 98101

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23,744, 23,745, 23,752, 23,753

UNITED STATES OF AMERICA for the use of ACME GRANITE & TILE COMPANY, a Division of PIPER & GREENHALGH, INCORPORATED, a Washington corporation,
Appellant and Cross-Appellee,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; B & G CONSTRUCTORS, INCORPORATED,
Appellees and Cross-Appellants,

AMERICAN SURETY COMPANY,
Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Appellant and Cross-Appellee,

and

UNITED STATES FIDELITY & GUARANTY COMPANY,
Appellee and Cross-Appellant.

[December 28, 1970]

Appeal from the United States District Court for the Western District of Washington, Southern Division

Before: HAMLEY and WRIGHT, Circuit Judges, and GOODWIN, District Judge.*

GOODWIN, District Judge:

In an action by a subcontractor for damages against the prime contractor on an army housing project, the subcon-

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* The Honorable Alfred T. Goodwin, District Judge for the District of Oregon, sitting by designation.

tractor appeals from a judgment notwithstanding the verdict.

The district court separated the issues of liability and damages. The jury found in favor of the plaintiff subcontractor on the issue of liability. The damages issues were then referred to a special master, who computed damages. The court modified the master's findings and entered the challenged judgment in favor of the prime contractor notwithstanding the verdict in favor of the subcontractor. Both parties seek review of various trial court rulings.

The dispute arises out of a subcontract entered into by Acme Granite & Tile Company, a division of Piper & Greenhalgh, Inc., and F. D. Rich Company, the prime contractor on a government contract for the construction of some five hundred "Capehart" homes at Fort Lewis, Washington. (The project was funded pursuant to the Capehart Act, 42 U.S.C. §§ 1594-1594k.)

The subcontract specified that Acme was to "[f]urnish all labor, materials and equipment required to complete all lathing, plastering and ceramic tile work as per plans and specifications * * *." The work was to be supervised and approved by a designated representative of the U. S. Army Corps of Engineers. One provision of the subcontract required Acme to proceed with work on the written order of Rich regardless of any dispute about payment.

Acme obtained a surety bond from Fireman's Fund Insurance Company and began work. The sequence of construction called for a framing subcontractor, B & G Constructors, Inc., to frame the houses, with Acme to follow in each house with the plaster and tile work.

Because of defective framing by B & G, the Army inspector revoked his approval of certain houses on which Acme was working. The framing was out of plumb and not parallel. The engineer rejected some fifty units and

warned Acme that further plastering over defective framing would meet with similar rejection.

Protests by Acme to Rich resulted in conferences and exchanges of letters. The quality of B & G's corrective measures was in dispute. An impasse developed and Acme refused to proceed. On March 11, Rich declared Acme in default and employed Sunset Tile Company to finish the work. A new Corps of Engineers inspector was appointed to replace the engineer who had found fault with B & G's work. There were no more work stoppages.

Following Rich's termination of Acme's subcontract, Acme was ultimately forced into bankruptcy and liquidation. In the meantime Acme had brought an action against Rich asserting a lien claim for $57,446.46 in unpaid progress payments. Acme also asserted a claim later determined to be worth some $17,000 representing the value of the plastering, lathing and tiling work converted to Rich's use by Sunset after Acme's contract was terminated, and a claim for some $100,000 in consequential damages resulting from Rich's "unjustified termination" of the contract. Rich counterclaimed against Acme for some $200,000 in increased costs resulting from Acme's refusal to continue work, and brought B & G and its holding company into the action by asserting a third-party claim against them contingent upon Rich's own liability to Acme. B & G also asserted a claim against Acme for damages for delay allegedly caused by Acme.

At the conclusion of a trial which generated thirty-four volumes of testimony, the jury returned a special verdict in favor of Acme.

Counsel for Rich filed alternative motions for judgment n.o.v. and a new trial, and also filed a motion to dismiss Acme's action on ground that, because the Acme corporation was dissolved while the litigation was in progress, its action automatically abated under Washington law.

Counsel for Acme asserted that the corporate dissolution was the result of a misunderstanding between counsel, the corporation's accountant, and Acme's trustee on liquidation. Counsel filed with the trial court a motion to substitute Acme's two sole stockholders, Piper and Greenhalgh, in place of the defunct corporation. This motion was denied, and the court ordered Acme's action abated.

The applicable Washington law then provided that dissolution of a corporation abated any action in which the dissolved corporation was a plaintiff. *United States* v. *Spokane Mill Co.*, 206 F. 999 (E.D. Wash. 1913). This law has since been changed, but the change has no retroactive force. See RCW 23A.28.250. The difficult question, however, is whether under Fed. R. Civ. P. 25(c) the motion to substitute parties, made by the two stockholders of the dissolved corporate plaintiff, should have been allowed by the district court.

A district court has ample discretionary power to substitute parties plaintiff where a corporate dissolution or some other act affecting the capacity to sue has occurred during the pendency of an action. *Brown* v. *Keller*, 274 F.2d 779 (6th Cir. 1960); *Feener Business Schools* v. *Speedwriting Pub. Co.*, 249 F.2d 609 (1st Cir. 1957); *United States* v. *Koike*, 164 F.2d 155 (9th Cir. 1947); *United States* v. *Hirahara*, 164 F.2d 157 (9th Cir. 1947); *Killebrew* v. *Moore*, 41 F.R.D. 269 (N.D. Miss. 1966); Fed. R. Civ. P. 25(c). Were it not for such a power of substitution, valuable property rights involved in litigation could simply disappear. Such a result would be at odds with both common sense and state law. See, e.g., *Ban-Mac, Inc.* v. *King County*, 69 Wash. 2d 49, 416 P.2d 694 (1966); *Taylor* v. *Interstate Inv. Co.*, 75 Wash. 490, 135 P. 240 (1913).

Under Washington law, the dissolution of a corporate entity does not necessarily relieve the corporation's assets or the stockholders who receive them from liability to its creditors. *Mayflower Realty Co.* v. *Security Savings &*

Loan Soc., 192 Wash. 129, 72 P.2d 1038 (1937); *State ex rel. Everett Trust & Savings Bank* v. *Pacific Waxed Paper Co.*, 22 Wash. 2d 844, 157 P.2d 707 (1945).

Counsel for Acme argues strenuously that the dissolution was simply the product of a misunderstanding between himself and the accountant, and that he informed the trial court of the dissolution as soon as he knew of it himself. He also argues that because Acme was fully bonded Acme's stockholders had no motive to attempt to escape liability. Whether or not this last argument has merit, however, depends upon subrogation agreements and legal principles that have not been litigated below and are not before us. In any event, there is no evidence that the dissolution could have prejudiced Rich, or that it was a "fraud upon the court." Fireman's Fund, as surety, is entitled to due process. The abatement of the action below appears, under all the circumstances, to have been unwarranted and prejudicial to Fireman's Fund as well as to Acme's stockholders.

Protection of those beneficially interested in the floundering corporation was well within the equity powers of the court. *Bacon* v. *Robertson*, 59 U.S. 480 (1855). On all the facts of this case we are reluctantly compelled to conclude that the district court abused its discretion in denying the motion for a substitution of parties plaintiff and in leaving the corporation's surety vulnerable to a judgment on a counterclaim with no right of set-off.

The next question is whether entry of judgment notwithstanding the verdict was proper. We hold that it was not. The jury could reasonably have concluded that Acme's witnesses were telling the truth.

Questions as to the consistency and credibility of witnesses are obviously within the province of the jury. The fact that this court might reach a different result than the jury reached would not authorize us to affirm a judgment

notwithstanding the verdict. Unless there is no substantial evidence to support the jury's conclusions, the verdict must stand, subject, of course, to the right of the district court to grant a new trial under Fed. R. Civ. P. 59.

We are not persuaded by Rich's argument that the only question involved in this case is the legal interpretation of the subcontract between Rich and Acme. Factual issues had to be resolved by a jury. It is true that Article V of the contract required Acme to proceed with work and not delay the whole project while it argued over compensation. But this provision of the contract may have been modified by the conduct of the parties. Also, the argument between the parties may not have been entirely a dispute over payment. In part, the dispute concerned the quality of performance and the impossibility of continued performance. In any event, there was a question of fact whether Rich, by its failure to have B & G correct the defective framing job, prevented Acme from going ahead with its obligations under the contract. If Rich, through another subcontractor, prevented Acme's performance, Rich cannot be heard to complain of Acme's nonperformance, *Wolk* v. *Bonthius*, 13 Wash. 2d 217, 124 P.2d 553 (1942); *Mogul Logging Co.* v. *Smith Livesey Wright Co.*, 185 Wash. 509, 55 P.2d 1061 (1936); *Blair* v. *Wilkinson Coal & Coke Co.*, 54 Wash. 334, 103 P. 18 (1909).

Rich relies heavily on *Stoeckert* v. *United States*, 391 F.2d 639 (Ct. Cl. 1968), for the proposition that only legal questions are involved. However, in *Stoeckert*, the subcontractor refused to proceed with work in spite of the government inspector's urgent pleas that it do so. Here, the jury could have believed that the government inspector told Acme that its work would be rejected if Acme proceeded.

Something more than a legal interpretation of Acme's contractual duties, therefore, is involved in this case. A breach of contract by Rich may well have occurred before Acme refused to proceed. Reasonable men might differ as

to which party first breached its obligation under the agreement and prevented the other from performing its duties. This is the kind of factual question that should be decided by the jury.

We conclude that the judgment notwithstanding the verdict was error. This conclusion, however, does not permit us to reinstate the verdict.

At the end of the case, the trial court granted an alternative motion for a new trial, to take effect only if the judgment n.o.v. should be reversed.

A motion for a new trial is addressed to the sound discretion of the trial judge, and must be left standing by this court absent a showing of abuse of discretion. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940); and see cases in 6A Moore, Federal Practice § 59.08(5), pp. 3814-3821 (2d ed. 1966). No showing has been made that the district court abused its discretion in granting the motion for new trial. Therefore, under established rules of appellate review, we remand this case to the district court for a second trial in accordance with the order granting the motion for new trial.

Reversed and remanded.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
U. S. COURT OF APPEALS AND POST OFFICE BUILDING
7TH & MISSION STREETS, P. O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Dec. 28, 1970

Re: Nos. 23744, 23745, 23752, 23753, USA, et al. v. F. D. Rich Co., et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered reversing and remanding the judgment or order of the court below (or administrative agency). You have 14 days from this date to file a petition for rehearing if you wish to do so.

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

WM. B. LUCK,
Clerk of Court

(This letter indicates that the judgment was by docket entry December 28, 1970 pursuant to Rule 36 of the Federal Rules of Appellate Procedure,)

[Richard S. White
John E. Ederer
Helsell, Paul, Fetterman, Todd & Hokanson
1610 Washington Building
Seattle, Washington 98101
MU 2-3850

Attorneys for F. D. Rich Company, Incorporated and American Surety Company]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

No. 2990

THE UNITED STATES FOR THE USE AND BENEFIT OF ACME GRANITE & TILE COMPANY, a Division of Piper & Greenhalgh, Inc., a Washington corporation, *Plaintiff*,

v.

F. D. RICH COMPANY, INCORPORATED, a corporation, doing business in the State of Washington; et al, *Defendants*,

and

FIREMAN'S FUND INSURANCE COMPANY; UNITED STATES FIDELITY & GUARANTY COMPANY, *Defendant to Counterclaim and Cross-Claim.*

Stipulation as to Facts Pertaining to Corporate Status of Plaintiff Piper & Greenhalgh, Inc.

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that the following are the true and correct facts that pertain to a determination of the status of plaintiff Piper & Greenhalgh, Inc.:

April 10, 1963	Piper & Greenhalgh, Inc. (for its division Acme) files complaint in the instant action # 2990
October 18, 1965	Val Greenhalgh and George Piper sign resolution for voluntary dissolution of plaintiff corporation Piper & Greenhalgh, Inc.
	Greenhalgh, et ux and Piper, et ux, sole stockholders of plaintiff corporation and owners of all capital stock thereof.

November 10, 1965	Dissolution resolution filed by attorneys for plaintiff, Cooper and Cooper, with Secretary of State of Washington.
December 31, 1965	Piper, as liquidating trustee for dissolved corporation, certifies "all obligations of the corporation have been paid and all assets of the corporation distributed to stockholders and for all purposes the corporation has been fully liquidated."
February 18, 1966	(8 months prior to trial commencing October 17, 1966) Secretary of State issues certificate of final dissolution.
	At no time have proceedings been taken or documents executed purporting to transfer the cause of action asserted by Acme in Cause No. 2990.
	Numerous documents filed in this court since February 18, 1966 represent continued existence of plaintiff corporation.
August 9, 1966	In affidavit Greenhalgh testifies he is a majority stockholder "in Piper & Greenhalgh, Inc., a Washington corporation."
October 17, 1966	Trial commences. In trial testimony Greenhalgh testifies to residence in Canada. In pretrial deposition Greenhalgh testified to residence in Everett, Washington. Greenhalgh testimony at trial prompts White of attorneys for Rich to make inquiry at Secretary of State's office concerning status of plaintiff corporation.

November 2, 1966 — Verdict of jury returned.

November 4, 1966 — Ederer, associate of White, advised by Secretary of State that plaintiff corporation was finally dissolved as of February 18, 1966.

No facts re dissolution of plaintiff corporation reported or intimated in any way to the Court prior to filing of memoranda on post-verdict motions.

DATED: January 25, 1967.

RALPH B. POTTS
Ralph B. Potts, Attorney for plaintiff.

JOHN E. EDERER
Of Helsell, Paul, Fetterman, Todd & Hokanson, Attorneys for F. D. Rich Company, Incorporated.

MERRIFIELD B. REES
Of McCormick, Hoffman & Rees, Attorneys for B & G Constructors

APPROVED: January 26, 1967 1967.

GEORGE H. BOLDT
George H. Boldt, United States District Judge

Full story not here. Otherwise approved.

GEORGE P. PIPER

V. B. GREENHALGH